No. 47975-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of

Brian Taylor-Rose,

Appellant.

Clallam County Superior Court Cause No. 12-2-01143-8

The Honorable Judge Brian Coughenour

Appellant's Reply Brief

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I. THE JURY'S VERDICT DOES NOT AUTHORIZE CIVIL COMMITMENT IN THIS CASE.

A. The jury did not find that Mr. Taylor-Rose is likely to engage in predatory sexual violence if released on community supervision.

Upon release from detention, Mr. Taylor-Rose will serve a 36-48 month term of court-ordered community supervision. Ex. 20, p. 4. This qualifies as a "placement condition" that the jury should have been allowed to consider when deciding if he qualified for commitment. *See* RCW 71.09.015; RCW 71.09.060(1); 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.14 (6th ed.) – Note on Use.

However, rather than directing jurors to evaluate Mr. Taylor-Rose's risk level under real-world conditions, which include this term of DOC supervision, the trial judge instructed them to consider his risk if released "unconditionally." CP 27. No evidence suggested that he would be released unconditionally.

The jury is presumed to have followed the court's instructions, and those instructions are incorporated into the verdict. *State v. Mohamed*, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016); *State v. Pharr*, 131 Wn.App. 119, 124, 126 P.3d 66 (2006), *disapproved of on other grounds by State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010).

What this means is jurors found Mr. Taylor-Rose *would* qualify as a sexually violent predator *if he were to be released unconditionally*. Given the court's instructions, that is the meaning of the jury's verdict. *Pharr*, 131 Wn.App. at 124. Because it is undisputed that Mr. Taylor-Rose will be subject to conditions of community supervision, the verdict does not apply to him.

This result stems primarily from the prospective nature of civil commitment hearings. The jury is charged with more than just determining historical facts, as in a criminal case; instead, jurors must also predict the future.

Here, the jury has predicted that Mr. Taylor-Rose will likely engage in predatory acts of sexual violence *if released unconditionally*. CP 9, 27. The jury has not predicted that he is likely to engage in such acts if released on community supervision.

Because his release will be under conditions of community supervision, the particular verdict rendered by this jury cannot justify civil commitment. The order committing Mr. Taylor Rose must be reversed and the case remanded for a new trial.

The state candidly admits to confusion about the issue. Brief of Respondent, p. 10. Respondent's argument reflects this confusion. Brief of Respondent, pp. 10-15 (addressing evidentiary sufficiency).

Mr. Taylor-Rose is not asking the court to determine if a rational trier of fact "'could have found'" the facts necessary for commitment. *In re Det. of Anderson*, 185 Wn.2d 79, 90, 368 P.3d 162 (2016) (quoting *In re Det. of Audett,* 158 Wash.2d 712, 727–28, 147 P.3d 982 (2006)). Instead, he points out what the jury *did* find and what it *did not* find.

The jury *did* find that Mr. Taylor-Rose would qualify for commitment if unconditionally released. The jury *did not* find that he qualified for commitment if released on community supervision.

The problem resembles that addressed by the Supreme Court in *In re Welfare of A.B.*, 168 Wn.2d 908, 924, 232 P.3d 1104, 1112 (2010), *as amended* (Sept. 16, 2010). There, the court found that parents facing termination have a right to a trial court finding of current parental unfitness. The *A.B.* court rejected the idea that a parent's right to such a finding is satisfied when the evidence is sufficient to make the finding. *Id.* When adapted to this case, the *A.B.* court's language can be read:

> To ask whether the State presented [sufficient] evidence is to ask whether the [jury] *could* have found for the State. To ask whether [the jury verdict supports commitment] is to ask what the [jury] *did* find. But to hold that the [jury] *could* have [found Mr. Taylor-Rose qualifies for commitment even if released on community supervision] says nothing about whether the [jury] *did (or did not)* find that.

Id. (emphasis in original) (footnotes omitted).

A similar problem was addressed in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008). There, the sentencing court imposed a firearm enhancement after jurors returned a verdict finding the defendant armed with a deadly weapon. Even though the only weapon at issue was a firearm, the Supreme Court vacated the enhancement as "a sentence that was not authorized by the jury." *Id.,* at 439.[1]

Here, as in *Recuenco,* the commitment order "was not authorized by the jury," because the jury only considered Mr. Taylor-Rose's risk of predatory sexual violence if released unconditionally. Respondent's argument does not directly address the issue raised by Mr. Taylor-Rose in his Opening Brief.

The jury did not find that Mr. Taylor-Rose qualifies for commitment under the real-world conditions he will face upon release. CP 9, 27; *Pharr,* 131 Wn.App. at 124. There is no jury finding that he is likely to engage in predatory acts of sexual violence if released on community supervision. Because of this, the verdict does not justify commitment, and the commitment order was entered in violation of Mr. Taylor-Rose's right to a jury trial.[2] *Recuenco*, 163 Wn.2d at 439.

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[1] Because *Recuenco* involved the constitutional right to a jury trial under Wash. Const. art. I, §21, it does not control here; however, the principle illustrated in *Recuenco* is the same as that put forth by Mr. Taylor Rose.

[2] *See* RCW 71.09.050(3); Wash. Const. art. I, §21.

B. A reasonable interpretation of the court's instructions precluded the jury from considering Mr. Taylor-Rose's term of community supervision when assessing his risk.

Mr. Taylor-Rose's argument requires the court to determine the meaning of the "likely to engage" instruction. CP 27; *see Pharr,* 131 Wn.App. at 124. Courts interpret instructions "the way a reasonable juror *could have* interpreted" them. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (emphasis added).[3]

Although Respondent argues that Mr. Taylor-Rose "incorrectly applies" *Miller,* the state offers no other standard for evaluating jury instructions. Brief of Respondent, p. 12. Furthermore, Respondent's criticism lacks logic. Respondent suggests the *Miller* standard cannot apply here because *Miller* cites a case[4] involving conclusive presumptions and burden shifting. Brief of Respondent, p. 12. But *Miller* itself involved the omission of an element, not a mandatory presumption. *Id.,* at 86-91. The *Miller* court did not purport to limit the "reasonable juror" standard to only one kind of instructional error. *Id.*

Similarly misplaced is Respondent's argument that the jury "was able to consider the criminal conditions of supervision in its determination

[3] This standard is a corollary of the requirement that the court's instructions be manifestly clear to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

[4] *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

in this case." Brief of Respondent, p. 12. This argument misses the mark for two reasons.

First, the proper question involves the jury's understanding of the instruction, not the abstract legal effect of the language used. Second, even if the jury believed it could consider DOC supervision generally "in its determination in this case,"[5] this does not mean jurors believed they could consider the evidence on the issue of Mr. Taylor-Rose's likelihood of engaging in predatory sexual violence. CP 27.

A reasonable juror "could have interpreted" the court's instructions to prohibit consideration of Mr. Taylor-Rose's upcoming term of community supervision when assessing his risk of predatory sexual violence. CP 27; *Miller*, 131 Wn.2d at 90. Without this prohibition, the jury might have decided that he was *not* likely to engage in such acts if released on community supervision. This requires reversal of the commitment order. *See In re Det. of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010).

[5] Brief of Respondent, p. 12.

II. THE COURT SHOULD NOT HAVE REJECTED MR. TAYLOR-ROSE'S PROPOSED INSTRUCTIONS OR OVERRULED HIS OBJECTIONS TO THE INSTRUCTIONS GIVEN.[6]

Mr. Taylor-Rose proposed instructions that made clear jurors could consider his court-ordered community supervision when assessing his risk, and alerting jurors that the state could file a new petition if he committed an "overt act." CP 66-68, 99. He also objected to an instruction directing jurors to assess his risk if he were to be released "unconditionally." Ex. 20; RP 2490-2502. The court overruled the objections and rejected the proposed instructions. RP 2490-2502; CP 99-100.

By overruling Mr. Taylor-Rose's objections and rejecting his proposed instructions, the court relieved the state of its burden to prove that Mr. Taylor-Rose is currently dangerous. Such a showing is constitutionally required for civil commitment. Because the instructions relieved the state of its burden to prove this element, the commitment order must be reversed and the case remanded for a new trial with proper instructions.

[6] This argument is closely related to the above argument—that the verdict, when interpreted in light of the instructions given, does not authorize commitment.

A. Instructions are reviewed *de novo* and must be manifestly clear to the average juror.

Legal errors in jury instructions are reviewed *de novo. State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). Respondent asks the court to apply an abuse-of-discretion standard but does not claim Mr. Taylor-Rose's arguments involve issues of fact. Brief of Respondent, pp. 16-17, 20.

Instead, Respondent erroneously suggests that all non-constitutional errors are reviewed for an abuse of discretion. Brief of Respondent, pp. 16-18. This is incorrect. *Id.; see also, e.g., Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

Mr. Taylor-Rose argues that the court erred by overruling his objections and rejecting his proposed instructions. Like all errors of law, his claims must be reviewed *de novo. Condon*, 182 Wn.2d at 316; *see also State ex rel. Banks v. Drummond*, 92749-9, 2016 WL 7321801, at *4 (Wash. Dec. 15, 2016); *State v. Murray*, --- Wn.2d ---, ___, 384 P.3d 1150 (2016); *Avnet, Inc. v. Washington Dep't of Revenue*, --- Wn.2d ---, ___, 384 P.3d 571 (2016). Respondent does not explain why this court should ignore the *de novo* standard.

Jury instructions must make the relevant standard "'manifestly apparent to the average juror.'" *State v. Kyllo*, 166 Wn.2d 856, 864, 215

P.3d 177 (2009) (addressing standard in criminal cases) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). Respondent does not argue against application of this criminal standard to civil commitment cases. Brief of Respondent, pp. 16-27.

This failure may be taken as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Respondent proposes a more lenient standard[7] but provides no reason to prefer this standard in civil commitment cases, which involve a "massive"[8] deprivation of liberty. Brief of Respondent, p. 16.

By contrast, in his Opening Brief Mr. Taylor-Rose provided pages of argument explaining why the *Kyllo* standard should apply to civil commitment cases. *See* Appellant's Opening Brief, pp. 13-16. Respondent's failure to address Mr. Taylor-Rose's in-depth argument on this point should also be taken as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

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[7] "Jury instructions are not erroneous if they (1) permit each party to argue the theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier-of-fact of the applicable law." Brief of Respondent, p. 16. Although this standard has been applied in criminal cases, it derives from civil cases involving money, not loss of liberty. *See State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968) (citing *Carson v. Old National Bank,* 37 Wash. 279, 79 P. 927 (1905); *Smith v. McDaniel,* 53 Wash.2d 604, 335 P.2d 582 (1959); and *Short v. Hoge,* 58 Wash.2d 50, 360 P.2d 565 (1961)).

[8] *See, e.g., In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) ("massive" deprivation of liberty requires narrow construction of statute).

The errors should be addressed *de novo,* and the instructions assessed to see if they made the legal standard manifestly clear. *Condon*, 182 Wn.2d at 316; *Kyllo*, 166 Wn.2d at 864. Furthermore, the trial judge committed reversible error even if the court adopts the more lenient standard proposed by the state.

B. The court's instructions failed to make the relevant legal standard manifestly clear, provided an incorrect statement of the law, misled the jury, and denied counsel a full opportunity to argue Mr. Taylor-Rose's theory.

The court instructed jurors to consider Mr. Taylor-Rose's risk if he were to be released unconditionally, and refused to instruct them they could consider available "placement conditions." CP 27, 99-100. Nor did the court tell jurors that the state could file a new petition if Mr. Taylor-Rose committed an "overt act" following release. CP 27, 99.

The court's instructions were improper. They did not make the proper standards manifestly clear, they misstated the law, they misled the jury, and they prohibited counsel from arguing Mr. Taylor-Rose's theory of the case.

As given, the instructions suggested that the jury could not consider his term of community supervision when assessing his likelihood of engaging in predatory sexual violence following release. CP 27. Furthermore, jurors had no way of knowing the state could seek

commitment if Mr. Taylor-Rose did anything creating a reasonable apprehension of sexually violent harm, even if he did not reoffend. CP 10-30; RCW 71.09.020(12).

But a jury may consider "placement conditions," such as a term of community supervision, when evaluating risk. *See* RCW 71.09.060(1); RCW 71.09.015; WPI 365.14-Note on Use. Jurors may also consider the availability of a petition based on a "recent overt act," which the Supreme Court has found relevant to a determination of risk. *In re Det. of Post*, 170 Wn.2d 302, 316–17, 241 P.3d 1234 (2010). The court's instructions did not make these standards "manifestly apparent" to the jury. *Kyllo*, 166 Wn.2d at 864

In fact, the instructions gave the opposite impression, misstating the law and misleading jurors into thinking they could only consider the risk Mr. Taylor-Rose would pose if released "unconditionally." CP 27.[9] In addition, the instructions did not allow counsel to argue her trial theory. Although she pointed out that he would be on community supervision, this argument contradicted the instructions, which required jurors to consider his risk upon unconditional release and thus barred them from considering his term of supervision. CP 27; RP 2616-2617.

[9] The failure to explain the availability of a new petition following a recent overt act likely also misled jurors into believing that Mr. Taylor-Rose could only be committed in future if he committed a new sexually violent offense.

The instructions were not manifestly clear. *Kyllo*, 166 Wn.2d at 864. Furthermore, they did not "permit each party to argue the theory of the case," they were misleading, and they did not, even when read as a whole,"properly inform the trier-of-fact of the applicable law." Brief of Respondent, p. 16 (citing *Judd v. Department of Labor & Indus.*, 63 Wn. App. 471, 820 P.2d 62 (1991)).

Under any test, the instructions were erroneous. The error requires reversal, because it allowed jurors to vote in favor of commitment even if they believed that Mr. Taylor-Rose could reside safely in the community.

Due process requires that civil commitment rest on proof that a detainee is currently dangerous. *See In re Det. Of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009) (citing, *inter alia*, *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)). The court's instructions violated due process because they allowed commitment even if jurors did not believe Mr. Taylor-Rose is currently dangerous. *Foucha*, 504 U.S. at 77.[10]

[10] Respondent argues that the error here does not violate the constitution in other ways. Brief of Respondent, pp. 18-20. Respondent does not claim that the instructions required proof that Mr. Taylor-Rose is currently dangerous, or otherwise defend against the due process challenge. Brief of Respondent, pp.

Some jurors may have believed that Mr. Taylor-Rose is not currently dangerous because of his community supervision term. Ex. 20 p. 4. The court's instructions directed them to disregard this belief. CP 27.

Other jurors may have found that "the consequences for engaging in [a recent overt act] may well serve as a deterrent." *Post*, 170 Wn.2d at 316–17. The court's instructions did not alert them to this possibility. CP 27.

Proper instructions would have allowed jurors to assess the likelihood that Mr. Taylor-Rose would commit predatory sexual violence in light of his impending term of community supervision and the availability of a new petition for a recent overt act. Here, the instructions allowed commitment even if jurors believed that Mr. Taylor-Rose is not currently dangerous.

This violated his right to due process. *Foucha*, 504 U.S. at 77. The commitment order must be reversed and the case remanded for a new trial with proper instructions. *Id.*; *Post*, 170 Wn.2d at 316–17.

III. WHEN STRICTLY CONSTRUED AND GIVEN AN INTERPRETATION THAT AVOIDS CONSTITUTIONAL DIFFICULTY, RCW 71.09 PROHIBITS COMMITMENT BASED ON LIFETIME RISK.

Statutes should be construed to avoid constitutional difficulty. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d

953 (2015). In addition, RCW 71.09 must be strictly construed. *Hawkins*, 169 Wn.2d at 801.

Civil commitment is premised on a risk of future behavior, but the statute can only apply to those who are currently dangerous. RCW 71.09.020(7), (18); *Foucha,* 504 U.S. at 78. RCW 71.09 does not explicitly limit the timeframe for evaluating risk. Nonetheless, the duty to strictly construe the statute and the obligation to avoid constitutional difficulty forbids commitment based on lifetime risk. *Id.; Hawkins*, 169 Wn.2d at 801; *Utter,* 182 Wn.2d at 434.

Except in rare cases (where a detainee is near the end of life), current dangerousness cannot be premised upon lifetime risk. If a person is not dangerous unless risk is aggregated over a long period of time, that person cannot be described as *currently* dangerous.

Contrary to Respondent's argument, no Washington court has upheld civil commitment on the basis of lifetime risk. Brief of Respondent, pp. 27-29. The *Moore* case, upon which Respondent relies, does not endorse commitment based on lifetime risk. Brief of Respondent, p. 28 (citing *Moore*). The *Moore* court held that the state need not prove a risk of re-offense within the "foreseeable future." *Moore*, 167 Wn.2d at 123-126. It was not asked to determine if commitment could constitutionally be based on lifetime risk. *Id.*

Dr. Hoberman opined that Mr. Taylor-Rose's lifetime risk exceeds 50%. Since Mr. Taylor-Rose is in his late thirties, this means that Hoberman aggregated risk over approximately 44 years.[11]

If Mr. Taylor-Rose is not likely to engage in predatory sexual violence over a shorter period of time, he cannot be described as currently dangerous. *Foucha,* 504 U.S. at 78. Hoberman did not provide a shorter timeframe in his testimony. Accordingly, the evidence was insufficient for commitment. *Id.* The commitment order must be reversed. *Id.*

IV. THE TRIAL COURT VIOLATED MR. TAYLOR-ROSE'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY COMMENTING ON THE EVIDENCE AND RELIEVING THE STATE OF ITS BURDEN TO PROVE A PRIOR CONVICTION FOR A "CRIME OF SEXUAL VIOLENCE."

Mr. Taylor-Rose rests on the argument set forth in his Opening Brief.

V. THE COURT OF APPEALS HAS DISCRETION TO DENY A REQUEST FOR APPELLATE COSTS.

Respondent erroneously contends that appellate courts lack discretion to deny appellate costs, except in criminal cases. Brief of Respondent, pp. 41-43 (citing RAP 14.2). In fact, as the Court of Appeals has recently made clear, the limitation in RAP 14.2 applies only to

[11] *See* Social Security Administration, Life Expectancy Calculator, available at https://www.ssa.gov/cgi-bin/longevity.cgi (last accessed January 7, 2017).

decisions of the clerk or commissioner. *State v. Grant*, ---Wn.App. ---, __, 385 P.3d 184 (2016). Such decisions are subject to modification by the court. *Id.*

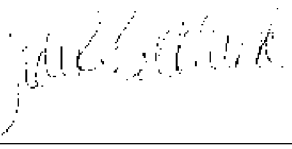
The concerns identified by the Supreme Court in *Blazina* apply with greater force to Mr. Taylor-Rose, since his detention does not stem from a criminal conviction. *State v. Blazina,* 182 Wn.2d 827, 835-839, 344 P.3d 680 (2015). Even if the state substantially prevails, the Court of Appeals should deny appellate costs. *Id.*

CONCLUSION

The commitment order must be reversed and the petition dismissed. Alternatively, the case must be remanded for a new trial with proper instructions.

Respectfully submitted on January 13, 2017,

BACKLUND AND MISTRY



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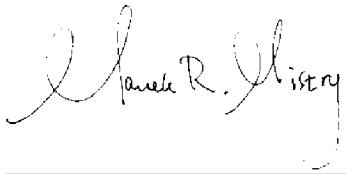

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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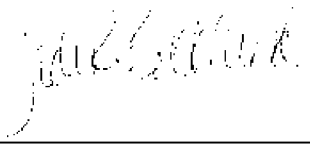
Signed at Olympia, Washington on January 13, 2017.



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